93-1972

(2)

Supreme Court, U.S.
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IN THE UNITED STATES SUPREME COURT
OCTOBER TERM, 1993

ANDREW LEO LOPEZ,

Petitioner,

vs. No.

DANIEL J. BEHLES, Trustee; and
WESTERN BANK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT WESTERN BANK'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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36pp

TABLE OF CONTENTS

Table of Authorities i

Statement of the Case 1

Standard of Review 4

Petitioner Does Not Have Standing to Appeal The Bankruptcy Court Orders Lifting Automatic Stay 5

The Appeal Of The Release Of The Stay Should Be Dismissed As Moot 12

Petitioner's Constitutional Rights Were Not Violated When The Bankruptcy Court Judge Refused to Disqualify Himself 16

Conclusion 18

TABLE OF AUTHORITIES

COURT OF APPEALS

Aetna Life Insurance v. Lavoie,
475 U.S. 813, 106 S.Ct. 1580 (1986) . . 16

Green v. Dorrell,
969 F.2d 915 (10th Cir. 1992);
cert.denied, 113 S.Ct. 1336 (1993) . . 16

Holmes v. Silver Wings Aviation, Inc.,
881 F.2d 939 (10th Cir. 1989). 6,7

In re El San Juan Hotel,
809 F.2d 151 (1st Cir. 1987) 6

In re Energy Cooperative, Inc.,
55 Bankr. 957 (Bankr. N.D.Ill. 1985) . . 8

In re L.F. Jennings Oil Co.,
4 F.3d 887 (10th Cir. 1993)
cert.denied, New Mexico Environment
Department v. Franco,
114 S. Ct. 1372 (1994) 5,13

In re Mark Bell Furniture Warehouse, Incorporated.,
992 F.2d 7 (1st Cir. 1993) 13,14

In re Schultz Manufacturing & Fabricating Co.,
956 F.2d 686 (7th Cir. 1992) 5

In re Chateaugay Corporation.,
10 F.3d 944 (2nd Cir. 1993) 13

In re Dykes,
10 F.3d 184 (3rd Cir. 1993) 5,6

In re Ewell,
958 F.2d 276 (9th Cir. 1992) 5,14

In re Schultz Manufacturing and Fabricating Co., Inc.,
110 Bankr. 384 (N.D. Indiana 1990) . . 8

In re Servico, Inc.,
161 Bankr. 297 (S.D. Fla. 1993) . . . 13

In re Abbotts Dairies of Pennsylvania, Inc.,
788 F.2d 143 (3rd Cir. 1986) 13

In re March,
988 F.2d 498 (4th Cir. 1993)
cert.denied, Kittay v. Farmers Bank,
114 S.Ct. 182 13

In re Sullivan Central Plaza I, Ltd.,
914 F.2d 731 (5th Cir. 1990) 13

In re Broadmoor Place Investments
994 F.2d 744 (10th Cir. 1993),
cert.denied, G-K Development Co., Inc. v. Broadmoor Place Investments,
114 S.Ct. 877 (1994) 8

In re Kujawa,
112 Bankr. 968 (E.D. Mo. 1990) 11

In re Suchy,
786 F.2d 900 (9th Cir. 1986) 14

International Trade Administration v. Rensselaer Polytechnic
936 F.2d 744 (2nd Cir. 1991) 6

Jaffree v. Wallace,
837 F.2d 1461 (11th Cir. 1988) 16

Markstein v. Massey Associates, Ltd,
763 F.2d 1325 (11th Cir. 1985) 13

Matter of Dupage Boiler Works, Inc.,
965 F.2d 296 (7th Cir. 1992),
cert.denied, Scherl v. Fisher,
113 S.Ct. 409 6,7

Matter of Shelby Motel Group, Inc.,
123 Bankr. 98 (N.D. Ala. 1990) 8

Matter of Fondiller,
707 F.2d 441 (9th Cir. 1983) 8

Matter of Andreucetti,
975 F.2d 413 (7th Cir. 1992) 8

Matter of Carbide Cutoff, Inc.,
703 F.2d 259 (7th Cir. 1983) 8

Matthews v. Eldridge,
424 U.S. 319, 96 S.Ct. 893 (1976) . . . 12

Tilley v. Vucurevich (In re Pecan Groves of Arizona)
951 F.2d 242 (9th Cir. 1991) 6,8

United States v. Mobile Materials,
881 F.2d 866 (10th Cir. 1989);
cert.denied, Philpot v. United States,
493 U.S. 1043, 110 S.Ct. 837 (1990) . . 16

United States v. Grinnell Corporation,
384 U.S. 563, 86 S.Ct. 1698, 1710 (1966) 16

United States v. Carignan,
600 F.2d 762 (9th Cir. 1979) 17

United States v. Prichard,
875 F.2d 789 (10th Cir. 1989) 17

Wells v. Dickinson,
403 F.2d 635 (6th Cir. 1968) 8

Willemain v. Kivitz,
764 F.2d 1019 (4th Cir. 1985) 6,7

STATUTES

United States Code
11 U.S.C. §303(c) 12
11 U.S.C. §348(d) 10
11 U.S.C. §363(m)(1) 13
11 U.S.C. §502(f) 10
11 U.S.C. §507(a)(2) 10
11 U.S.C. §726(b) 10

Federal Rules of Civil Procedure
Rule 52 4

Federal Rules of Bankruptcy Procedure
Rule 2018(a) 11
Rule 8013 4

STATEMENT OF THE CASE

1. On October 6, 1989, American Ready Mix, Inc. filed Chapter 11 in the United States Bankruptcy Court, District of New Mexico, in Cause No. 89-02832 MA.

2. On December 19, 1989, its sister corporation Albuquerque Sand and Gravel, Inc. filed Chapter 11 in the United States Bankruptcy Court, District of New Mexico, in Cause No. 89-03609 RA, which was later consolidated into Cause No. 89-02832 MA.

3. On April 5, 1990, the Bankruptcy Court approved an Order in Cause No. 89-02832 MA employing the Petitioner as a Certified Public Accountant to the Debtors-in-Possession.

4. On October 24, 1990, Cause No. 89-02832 MA was involuntarily converted to a Chapter 7 by Motion of the New Mexico Taxation & Revenue Department.

5. On January 2, 1991, Andrew Leo Lopez, CPA, entered an appearance in the case and asked to be added to the matrix.

6. On or about March 5, 1991, the Trustee abandoned the assets securing the Debtor's note to Western Bank.

7. On or about March 6, 1991, Western Bank motioned the bankruptcy court to approve a Stipulated Agreement for Relief From the Automatic Stay on equipment securing American Ready Mix's Note to Western Bank, between Western Bank, the Debtor and the Trustee. Notice of Deadline for Filing Objections was mailed to all creditors, including the Petitioner, on March 6, 1991, and a Supplement to the Notice of Deadline for Filing Objections was mailed to all creditors on March 7, 1991. On March 26, 1991, Andrew Lopez filed an Objection to Western Bank's Motion to Approve a Stipulated Agreement Terminating the Automatic Stay.

8. On May 10, 1991, the bankruptcy court held a hearing upon Western Bank's Motion for Approval of a Stipulated Agreement Terminating the Automatic Stay. Appearing at the hearing

was the Petitioner, who testified as a witness adverse to the Motion and who presented oral arguments to the Court as to why he thought the Motion should be denied. The Court ruled from the bench at the conclusion of the hearing, making specific Findings of Fact and Conclusions of Law in granting Western Bank's Motion.

9. On May 21, 1991, the Court entered an Order approving Western Bank's Motion to Approve a Stipulated Agreement Terminating the Automatic Stay. (See attached Exhibit 1)

10. In the Order, the Court found that the value of the collateral did not exceed the amount of the indebtedness owed to Western Bank and that there was no equity in the collateral for the benefit of the bankruptcy estate. (See attached Exhibit 1)

11. On May 17, 1991, counsel for Western Bank mailed notice to all creditors, including the Petitioner, of the private sale of the collateral to be consummated on May 29, 1991. (See attached Exhibit 2)

12. On May 22, 1991, counsel for Western Bank published in the Albuquerque Journal, the largest circulated newspaper in New Mexico, a Notice of Sale of Assets and Requests for Bids. (See attached Exhibit 3)

13. On May 24, 1991, counsel for Western Bank also published in the Health City Sun, the legal periodical for Albuquerque, New Mexico, a Notice of Sale and Request for Bids for the above-mentioned equipment. (See attached Exhibit 4)

14. Having received no other bids for the equipment, Western Bank sold the equipment in a private sale for $190,000, to a group of investors which included principals of the bankrupt companies.

STANDARD OF REVIEW

Pursuant to Rule 8013, Federal Rules of Bankruptcy Procedure, findings of fact shall not be set aside unless clearly erroneous. Additionally, Rule 52, Fed.R.Civ.P. states that "Findings of fact, whether based on oral or

documentary evidence, shall not be set aside unless clearly erroneous . . ."

Appellate courts review bankruptcy court's legal determinations de novo. In re L.F. Jennings Oil Co., 4 F.3d 887, 888, (10th Cir. 1993); cert.denied, New Mexico Environment Department v. Franco, 114 S. Ct. 1372 (1994); In re Dykes, 10 F.3d 184, 185 (3rd Cir. 1993); In re Ewell, 958 F.2d 276, 279 (9th Cir. 1992); and In re Schultz Manufacturing and Fabricating Co., Inc., 110 Bankr. 384, 387 (N.D. Indiana 1990).

PETITIONER DOES NOT HAVE STANDING TO APPEAL THE BANKRUPTCY COURT ORDERS LIFTING AUTOMATIC STAY

The underlying Bankruptcy Court Order, which is involved in this appeal, is the court approved Stipulated Order entered into by Western Bank, the Debtor and the Chapter 7 Trustee lifting the automatic stay and allowing Western Bank to proceed to sell certain equipment which secured loans from Western Bank to the Debtor.

The right of appellate review in bankruptcy

proceedings has historically been limited "persons aggrieved", i.e., those persons whose rights or interests are directly and adversely affected pecuniarily by an order or decree of the bankruptcy court. In re El San Juan Hotel, 809 F.2d 151, 154 (1st Cir. 1987). "A litigant qualifies as a person aggrieved if the order diminishes his property, increases his burdens, or impairs his rights." Id.

The majority of the circuits have adopted the "aggrieved persons" standard for determining appellate standing in bankruptcy. In re El San Juan Hotel, at 154; International Trade Administration v. Rensselaer Polytechnic Institute, 936 F.2d 744, 747 (2nd Cir. 1991); Willemain v. Kivitz, 764 F.2d 1019, 1022 (4th Cir. 1985); Matter of Dupage Boiler Works, Inc., 965 F.2d 296, 297 (7th Cir. 1992), cert.denied, Scherl v. Fisher, 113 S.Ct. 409; In re Dykes, 10 F.3d 184, 188 (3rd Cir. 1993); Tilley v. Vucurevich (In re Pecan Groves of Arizona) 951 F.2d 242, 245 (9th Cir. 1991); Holmes v. Silver

Wings Aviation, Inc., 881 F.2d 939, 940 (10th Cir. 1989).

The "persons aggrieved" test insures the bankruptcy proceedings are not unreasonably delayed by protracted litigation by allowing only those persons whose interests are directly affected by a bankruptcy order to appeal. Matter of Dupage Boiler Works, Inc., 965 F.2d 296, 297 (7th Cir. 1992). ". . . if appellate jurisdiction is not limited, bankruptcy litigation will become mired in endless appeals brought by a myriad of parties who are indirectly affected by every bankruptcy court order". Holmes v. Silver Wings Aviation, Inc., at 940 (quoting Kane v. Johns-Manville Corp., 843 F.2d 636, 642 (2nd Cir. 1988)).

On occasion even Debtors have been held not to have standing to appeal an order of the bankruptcy court. Holmes v. Silver Wings Aviation, Inc, at 940; Willemain v. Kivitz, at 1022-1023. Even a debtor's wife has been held not to have standing to appeal a bankruptcy

court order. Matter of Fondiller, 707 F.2d 441 (9th Cir. 1983). Likewise, unsuccessful bidders for purchase of Chapter 11 debtors' property have been held to lack standing as an "aggrieved person" to appeal a bankruptcy court order. In re Broadmoor Place Investments, 994 F.2d 744, 746 (10th Cir. 1993), cert.denied, G-K Development Co., Inc. v. Broadmoor Place Investments, 114 S.Ct. 877 (1994).

The general rule is that the Chapter 7 trustee of a corporation's bankruptcy estate has standing to contest a settlement on behalf of the corporation's unsecured creditors and shareholders. In re Schultz Manufacturing & Fabricating Co., 956 F.2d 686, 690 (7th Cir. 1992). Generally, in bankruptcy proceedings, unsecured creditors and shareholders of a corporation do not have standing to contest bankruptcy court orders. Id. at 690; Tilley v. Vucurevich, at 245.

In very limited circumstances, a few courts have recognized a narrow exception to the

general rule that trustees are the appropriate representatives of unsecured creditors in challenging bankruptcy court orders. The Seventh Circuit Court of Appeals has held that unsecured creditors can ask the Court for authority to appeal in the name of the trustee, if the trustee refuses to act. Matter of Carbide Cutoff, Inc., 703 F.2d 259, 264 (7th Cir. 1983). In the event a general creditor is dissatisfied with the conduct of the trustee in not litigating a claim, his recourse is to move the bankruptcy court for an order requiring the trustee to prosecute the claim or permit the creditor to appeal if the trustee declines to do so. Wells v. Dickinson, 403 F.2d 635, 636 (6th Cir. 1968); Matter of Shelby Motel Group, Inc., 123 Bankr. 98, 102 (N.D. Ala. 1990).

Another exception to the general rule is when there is a surplus from the sale of an asset, whereby the creditors would be adversely and directly affected by the bankruptcy court order. Matter of Andreucetti, 975 F.2d 413, 417

(7th Cir. 1992) (hopelessly insolvent debtor does not have standing to appeal).

Neither of the above-mentioned exceptions apply in this case. The Petitioner had an unsecured, administrative claim under the Chapter 11 bankruptcy. Prior to his application for payment of funds from the bankruptcy estate, the case was involuntarily converted to a Chapter 7 bankruptcy. At that time, any claims of the Petitioner for accountant fees against the estate dropped in priority behind the Chapter 7 administrative expenses. 11 U.S.C. §348(d); 11 U.S.C. §507(a)(2); 11 U.S.C. §502(f); 11 U.S.C. 726(b); In re Energy Cooperative, Inc., 55 Bankr. 957, 968 (Bankr. N.D.Ill. 1985). Curiously, the Petitioner has never filed a fee application with the bankruptcy court and thus may not occupy a position as a creditor.

As a potential Chapter 7 unsecured creditor, Petitioner does not have standing to appeal any order of the bankruptcy court. The

Petitioner never moved the court for an order requiring the trustee to deny the lifting of the stay or to permit Petitioner to appeal any order for the trustee. Additionally, there was no possibility of excess funds being realized on the sale of the assets securing the Western Bank Note. Thus, the Petitioner does not have standing to appeal the Bankruptcy Court Order lifting the stay under either of the exceptions to the general rule denying appellate standing to unsecured creditors.

Petitioner also claims he has a right to intervene in Cause No. 89-02832 MA and thus has standing to appeal as an intervenor. Pursuant to Bankruptcy Rule 2018(a), the court may permit any interested entity to intervene. However, creditors are not entitled to intervene as a matter of right in an involuntary petition, rather it is within the court's discretion. In re Kujawa, 112 Bankr. 968 (E.D. Mo. 1990). Additionally, a creditor with a contingent claim does not have standing to intervene. Id, at 970

(must satisfy requirements for petitioning creditors in 11 U.S.C. §303(c)). Petitioner has never filed a claim in this case and never petitioned to the court to intervene in Cause No. 89-02832 MA, thus he is not eligible to appeal as an intervenor.

The Petitioner's due process rights were not violated by his inability to appeal the Order of the bankruptcy court. The Petitioner was notified of the lifting of the stay, was notified of the hearing and in fact appeared and participated in the hearing. The Petitioner has been afforded all rights to which he is entitled under due process. See Matthews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893 (1976). The Petitioner's Petition for Writ of Certiorari should be denied.

THE APPEAL OF THE RELEASE OF THE STAYS SHOULD BE DISMISSED AS MOOT

An appeal from the decision of the bankruptcy court must be dismissed as moot if an event occurs while the appeal is pending that

makes it impossible for an appellate court to grant any effective relief to the prevailing party. In re Chateaugay Corporation., 10 F.3d 944, 949 (2nd Cir. 1993). The existence of case or controversy is a constitutional prerequisite to the jurisdiction of the federal courts. In re L.F. Jennings Oil Co., 4 F.2d 887, 888 (10th Cir. 1993); See also, In re Servico, Inc., 161 Bankr. 297, 300 (S.D. Fla. 1993).

Where an automatic stay is lifted, the appellee's failure to obtain a stay pending appeal renders an appeal moot after assets in which the creditor had an interest in are sold. In re Mark Bell Furniture Warehouse, Incorporated., 992 F.2d 7, 8 (1st Cir. 1993); In re L.F. Jennings Oil Co., at 888; In re Abbotts Dairies of Pennsylvania, Inc., 788 F.2d 143, 150 (3rd Cir. 1986); See, In re March, 988 F.2d 498, 499 (4th Cir. 1993); cert.denied, Kittay v. Farmers Bank, 114 S.Ct. 182; In re Sullivan Central Plaza I, Ltd., 914 F.2d 731, 733 (5th Cir. 1990); Markstein v. Massey

Associates, Ltd, 763 F.2d 1325, 1327 (11th Cir. 1985). See also, 11 U.S.C. §363(m)(1).

In order for the mootness doctrine to take effect, the sale must be to a good faith purchaser, i.e. one who buys in good faith and for value. In re Ewell, 958 F.2d 276, 281 (9th Cir. 1992); In re Mark Bell Furniture Warehouse, Incorporated, at 8. Lack of good faith can be shown by fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take gross unfair advantage of other bidders. In re Ewell at 281; In re Mark Bell Furniture Warehouse, Incorporated, at 8. Lack of good faith is determined by fraudulent conduct during the sale proceedings. In re Suchy, 786 F.2d 900, 902 (9th Cir. 1986).

The Petitioner has alleged that the sale of the assets by Western Bank was done fraudulently, in collusion with the Debtor, and at too low of a price. These are all factual assertions which Western Bank believes are false, but, more important than their falsity,

is that these assertions are unsupported in any record. The sale of the assets was done by private sale, to a group of investors which included the debtor. Notice of the sale was sent to all creditors and requests for bids were published in The Albuquerque Journal, the newspaper with the largest circulation in New Mexico, and the Health City Sun, the legal notice periodical for the City of Albuquerque. The equipment was sold for the amount due on the outstanding loan to the Chapter 7 Debtor, American Ready Mix, Inc. The bankruptcy court determined this was a fair value for the equipment when it approved the Stipulated Order. There was no fraud or collusion in the sale, as such the sale was to a good faith purchaser.

The Petitioner never applied for a stay of the sale of the equipment by Western Bank. Western Bank subsequently sold this property in which it had a security interest in, so that any decision on appeal would be moot. Thus there is no case in controversy and the federal courts do

not have jurisdiction over this issue. The Petition for Writ of Certiorari should be denied.

PETITIONER'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED WHEN THE BANKRUPTCY COURT JUDGE REFUSED TO DISQUALIFY HIMSELF

The Petitioner moved the Bankruptcy Court Judge to recuse himself on the basis of bias. This claimed bias apparently arises from adverse rulings against the Petitioner during the pendency of the Chapter 7 bankruptcy. Adverse rulings against a litigant cannot, in themselves, form the appropriate grounds for disqualification of a judge. United States v. Grinnell Corporation, 384 U.S. 563, 583, 86 S.Ct. 1698, 1710 (1966); Green v. Dorrell, 969 F.2d 915, 919 (10th Cir. 1992); cert.denied, 113 S.Ct. 1336 (1993).

In only the most extreme cases of bias or prejudice is disqualification of a judge constitutionally required. Aetna Life Insurance v. Lavoie, 475 U.S. 813, 820, 106 S.Ct. 1580,

1584 (1986). Any prejudice must be personal and extra-judicial in order for the due process requirements under the constitution to require disqualification of a district judge. United States v. Carignan, 600 F.2d 762, 764 (9th Cir. 1979); United States v. Prichard, 875 F.2d 789 (10th Cir. 1989); Jaffree v. Wallace, 837 F.2d 1461, 1465 (11th Cir. 1988).

The Petitioner has not alleged any personal bias from an extra-judicial source. He has only alleged that there is personal bias resulting from his conduct in the court hearings which has resulted in adverse rulings in the bankruptcy court. Consistent adverse rulings without more do not constitute judicial animosity sufficient to deprive a person of a fair trial. United States v. Mobile Materials, 881 F.2d 866 (10th Cir. 1989), cert.denied, Philpot v. United States, 493 U.S. 1043, 110 S.Ct. 837 (1990).

The Petitioner's due process rights have not been violated by the failure of the bankruptcy judge to recuse himself. This court

should not grant the Petitioner's Petition for Certiorari as the bankruptcy court's ruling, the district court ruling and the Tenth Circuit Court of Appeals rulings are correct in denying the recusal of the bankruptcy court judge and in denying the appeal on this issue.

CONCLUSION

The Supreme Court of the United States should not grant Petitioner's Petition for a Writ of Certiorari because Petitioner does not have standing to appeal the Orders of the bankruptcy court releasing the automatic stay so that the secured party Western Bank could sell the property securing its loans to the debtor, American Ready Mix. Furthermore, there is no case or controversy as to the lifting of the stay because the matter is moot due to the fact Petitioner never sought a stay pending appeal and that the equipment was sold to good faith purchasers.

Additionally, the Supreme Court of the United States should not grant Petitioner's

Petition for a Writ of Certiorari as to the issue of recusal or disqualification of the bankruptcy court judge because the Petitioner has not alleged any personal and extra-judicial bias which would interfere with his due process rights to a fair trial or hearing.

RESPECTFULLY SUBMITTED,

DUBOIS, CAFFREY, COOKSEY & BISCHOFF, P.A.

By_____

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APPENDIX A

STATUTES

FEDERAL RULES OF BANKRUPTCY PROCEDURE

RULE 2018(a): Intervention; Right to Be Heard

> (a) Permissive intervention. In a case under the Code, after hearing on such notice as the court directs and for cause shown, the court may permit any interested entity to intervene generally or with respect to any specified matter.

RULE 8013: Disposition of Appeal; Weight Accorded Bankruptcy Judge's Findings of Fact

> On an appeal the district court or bankruptcy appellate panel may affirm, modify, or reverse a bankruptcy judge's judgment, order, or decree or remand with instructions for further proceedings. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses. (Amended Aug. 1 1987.)

FEDERAL RULES OF CIVIL PROCEDURE

RULE 52: FINDINGS BY THE COURT

> (a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions

the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rule 41(b).

UNITED STATES CODE

11 U.S.C. §303 Involuntary cases

(c) After the filing of a petition under this section but before the case is dismissed or relief is ordered, a creditor holding an unsecured claim that is not contingent, other than a creditor filing under subsection (b) of this section, may join in the petition with the same effect as if such joining creditor were a petitioning creditor under subsection (b) of this section.

11 U.S.C. §348. Effect of conversion

(d) A claim against the estate or the debtor that arises after the order for relief but before conversion in a case that is converted under section 1112 or 1307 of this title [11 USCS §§1112, 1307], other than a claim specified in section 503(b) of this title [11 USCS §503(b)], shall be treated for all purposes as if such claim had arisen immediately before the date of the filing of the petition.

11 U.S.C. §502. Allowance of claims or interests

(f) In an involuntary case, a claim arising in the ordinary course of the debtor's business or financial affairs after the commencement of the case but before the earlier of the appointment of a trustee and the order for relief shall be determined as of the date such claim arises, and shall be allowed under subsection (a),(b), or (c) of this section or disallowed under subsection (d) or (e) of this

section, the same as if such claim had arisen before the date of the filing of the petition.

11 U.S.C. §507. Priorities

(a) The following expenses and claims have priority in the following order:
(1) First, administrative expenses allowed under section 503(b) of this title [11 USCS §503(b)], and any fees and charges assessed against the estate under chapter 123 of title 28 [28 USCS I1911 et seq.].
(2) Second, unsecured claims allowed under section 502(f) of this title [11 USCS §502(f)].

11. U.S.C. §726 Distribution of property of the estate

(b) Payment on claims of a kind specified in paragraph (1),(2),(3),(4),(5),(6), or (7) of section 507(a) of this title [11 USC §507(a)(1),(2),(3),(4),(5),(6), or (7)], or in paragraph (2),(3)(4), or (5) of subsection (a) of this section, shall be made pro rata among claims of the kind specified in each such particular paragraph, except that in a case that has been converted to this chapter [11 USCS §§701 et seq.] under section 1112, 1208, or 1307 of this title [11 USCS §1112, 1208, or 1307], a claim allowed under section 503(b) of this title [11 USCS §503(b)] incurred under this chapter [11 USCS §§701 et seq.] after such conversion has priority over a claim allowed under section 503(b) of this title [11 USCS §503(b)] incurred under any other chapter of this title [11 USCS §§101 et seq.] or under this chapter [11 USCS §§701 et seq.] before such

conversion and over any expenses of a custodian superseded under section 543 of this title [11 USCS §543].

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

IN RE:

AMERICAN READY MIX, INC.
a New Mexico corporation,
Federal ID #01-177568-00-8,

Debtor.

ALBUQUERQUE SAND & GRAVEL, INC.,
d/b/a American Sand & Gravel,Inc.
a New Mexico corporation,
Federal ID No. 85-0346640
State ID No. 02-062753-00-1,

Debtor.

No. 7-89-02832 RA
Jointly Administered

ORDER APPROVING MOTION TO APPROVE STIPULATED AGREEMENT TERMINATING AUTOMATIC STAY

THIS MATTER came before the Court for a hearing upon the Motion of Creditor Western Bank of Albuquerque (hereinafter "Western") for approval of a Stipulated Agreement Terminating Automatic Stay, which had been entered into and approved by Western, Trustee Daniel J. Behles (hereinafter "Trustee"), and the Debtor, pro se. Appearing at the hearing on May 10, 1991, was Western, by and through its Vice President, Jason A. Shaffer, and counsel, John F. Caffrey,

EXHIBIT 1

the Trustee, appearing in person and through counsel, Barbara, and Andrew Lopez, an objecting party (hereinafter "Lopez"), appearing pro se. After considering the arguments of counsel and Lopez, the testimony of the witnesses, and considering the physical exhibits and the bankruptcy file, the Court adopts the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. That on March 7, 1991, Western filed a Motion for Approval of a Stipulated Agreement Terminating Automatic Stay, a copy of which Agreement was attached to said Motion, and which had been entered into and approved by Trustee, the Debtor, and Western, which Agreement terminated the Automatic Stay of 11 USC §362, and allowed Western to foreclose upon its security interest in the collateral securing the loan (hereinafter "collateral"), which is described in detail in attachments to the Motion.

2. That on March 6, 1991, a Notice of

Deadline for Filing Objections to Motion to Approve Stipulated Agreement Terminating Automatic Stay was mailed to 143 parties, whose names appear on the Matrix in this case.

3. That on March 7, 1991, a Supplement to Notice of Deadline for Filing Objections to Motion to Approve Stipulated Agreement Terminating Automatic Stay was mailed to nineteen additional creditors or parties requesting notice.

4. That the Court file reveals that only two objections were filed to the afore-described Motion, those being the objections of Lopez and Berridge Distributing Company, Inc.

5. That the Court conducted a hearing on May 10, 1991, to take up Western's Motion and the objections thereto. Objecting party Berridge Distributing Company, Inc. failed to appear.

6. That the indebtedness owed Western by the Debtor exceeds $187,000, pursuant to two separate Promissory Notes, one dated May 20,

1988, in the original principal amount of $260,000 and a second dated July 24, 1989, in the original principal amount of $21,000, together with accruing interest and attorney's fees.

7. That the indebtedness owed Western is secured by the collateral.

8. That Western has properly perfected its security interest in the collateral.

9. That Western and Trustee have presented testimony with respect to the value of the collateral, and the Court finds that the value of the collateral does not exceed the amount of the indebtedness owed Western, and that there is no equity in said collateral for the benefit of the bankruptcy estate.

10. That no party has requested a hearing in a timely fashion as required by the provisions of 11 USCA §362(e).

11. That Lopez, the person opposing the Termination of the Automatic Stay, has not sustained the burden of proof that is imposed

upon him pursuant to the provisions of 11 USCA §362(g)(2).

CONCLUSIONS OF LAW

1. That Western has sustained its burden of proof on the issue of the Debtor's equity in the collateral in accordance with the provisions of 11 USCA §362(g)(1).

2. That Lopez has failed to sustain his burden of proof that is imposed upon him pursuant to the provisions of 11 USCA §362(g)(2).

3. That the automatic stay of 11 USC §362 should be lifted to allow Western to foreclose upon its security interest in the collateral. It is, therefore,

ORDERED, ADJUDGED AND DECREED that:

1. The automatic stay of 11 USC §362 is hereby terminated; and

2. The Motion of Western to Approve the Stipulated Agreement Terminating Automatic Stay is hereby approved to allow Western to foreclose upon its security interest in the collateral

securing the indebtedness owed Western by the Debtor which is more particularly described in the Motion to Approve the Stipulated Agreement Terminating Automatic Stay.

_____
UNITED STATE BANKRUPTCY JUDGE

Submitted and Approved:

DUBOIS, CAFFREY, COOKSEY & BISCHOFF, P.A.

_____
JOHN F. CAFFREY
Attorney for Western Bank
2040 Fourth ST., NW
Albuquerque, NM 87102

BEHLES, O'REILLY & BALL

_____
BARBARA A. BALL
Attorney for Chapter 7 Trustee
P.O. Box 415
Albuquerque, NM 87103

EXHIBIT 1

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

IN RE:

AMERICAN READY MIX, INC.
a New Mexico corporation,
Federal ID #01-177568-00-8,

Debtor.

ALBUQUERQUE SAND & GRAVEL, INC.,
d/b/a American Sand & Gravel,Inc.
a New Mexico corporation,
Federal ID No. 85-0346640
State ID No. 02-062753-00-1,

Debtor.

No. 7-89-02832 RA
Jointly Administered

NOTICE OF SALE OF COLLATERAL
BY WESTERN BANK OF ALBUQUERQUE

BY ORDER OF THE BANKRUPTCY COURT, the Automatic Stay has been terminated to allow Western Bank, Albuquerque, New Mexico ("Western Bank") to sell its collateral to satisfy the indebtedness owed Western Bank in the amount of approximately $190,000. The Bankruptcy Judge has determined that the value of the collateral is less than the amount of the outstanding indebtedness owed to Western Bank. The Bank proposes to sell this collateral to American Building Supply, Inc. (the "Corporation"), the principals of which are the individuals who originally guaranteed the indebtedness owed to Western Bank. Western Bank proposes to sell the collateral to the Corporation for the amount of the outstanding indebtedness. The sale to the Corporation will be consummated on May 29, 1991, unless a higher offer (payable only in cash or certified funds) is received by Western Bank before 2:00 p.m. on May 29, 1991. All offers

EXHIBIT 2

must be in writing and must be payable in cash or certified funds.

Offers and inquiries concerning this sale and to arrange for inspection of the collateral may be directed to Jason Shaffer, Senior Vice President, Western Bank of Albuquerque, 505 Marquette, N.W., P.O. Box 26144, Albuquerque, New Mexico, 87125-6144, (505) 888-9000.

DUBOIS, CAFFREY, COOKSEY & BISCHOFF, P.A.

GERALD E. BISCHOFF
Attorneys for Western Bank
2040 Fourth St., NW
Albuquerque, NM 87102
(505) 243 6721

EXHIBIT 2

May 20, 1991

FACSIMILE NO. (505) 823 3368

Albuquerque Journal
7777 Jefferson, NE
Albuquerque, NM 87109

ATTN: Classified Advertising

To Whom it May Concern:

Enclosed is a copy of the advertisement I would like placed in the "Equipment Sales" section of the classified ads of the Albuquerque Journal. I would like this to be published in the Journal for four (4) days starting on Wednesday, May 22, 1991, and ending on Saturday, May 25, 1991.

After publication please send your bill and I will see to it that you are paid right away.

If you have any questions, please contact the undersigned at the telephone number above. Thank you for your cooperation.

Very truly yours,

DUBOIS, CAFFREY, COOKSEY & BISCHOFF, P.A.

Gerald E. Bischoff

GEB:wc
Enclosure

EXHIBIT 3

Equipment and vehicles formerly used in sand and gravel business for sale. Minimum price $190,000.00. Inquiries call Jason at 888-9000 or write to P.O. Box 26144, Albuquerque, NM, 87125-6144.

EXHIBIT 3

AFFIDAVIT OF PUBLICATION

RECEIVED
MAY 29 1991
DUBOIS, CAFFREY & COCKSEY, P.A.
ATTORNEYS AT LAW

Health City Sun

Office: 900 Park Ave., S.W. - Dial 242-3010
Mail Address: P. O. Box 1517
Albuquerque, New Mexico 87103

State of New Mexico }
County of Bernalillo } ss.

Alicia Alvarez, being duly sworn declares and says she is the business manager of the Health City Sun, a weekly newspaper published and having a general paid circulation in the city of Albuquerque, County of Bernalillo, and State of New Mexico; that the said Health City Sun was entered in the post office at Albuquerque as second class mail matter on September 5, 1930, and has met all requirements of a legal newspaper under the laws of the State of New Mexico.

Affiant further states that this newspaper is duly qualified to publish Legal Notices or advertisements within the meaning of Section 14-11-4 of the New Mexico Statutes annotated (1978).

Affiant further states that the publication, a copy of which is hereto attached, was published in said paper in the regular and entire issue of each number of the paper, during the period and time of publication, and that the notice was published in the news paper proper and not in a supplement thereof for 1 weeks, the first publication being on the 24th day of May, 19 91, and the last publication being in the issue of the _____ day of _____, 19___.

Affiant further states that the costs of publishing said legal notice have been paid, or have been assessed as court costs in the case numbered.

Alicia Alvarez

Subscribed and sworn to before me, a Notary Public in and for said County and State, this 24th day of May, 19 91.

Notary Public

My Commission expires 11/28/91

UNITED STATES
BANKRUPTCY COURT FOR THE
DISTRICT OF NEW MEXICO
No. 7-89-02832 MA
[Jointly Administered]

In re:
AMERICAN READY MIX, INC.,
a New Mexico corporation,
Federal ID #01-177568-00-8,
Debtor,
ALBUQUERQUE SAND & GRAVEL, INC.
d/b/a American Sand & Gravel, Inc.,
a New Mexico corporation,
Federal ID # 85-0346640
State ID No. 02-062753-00-1,
Debtor.

NOTICE OF SALE OF COLLATERAL BY WESTERN BANK OF ALBUQUERQUE

BY ORDER OF THE BANKRUPTCY COURT, the Automatic Stay has been terminated to allow Western Bank, Albuquerque, New Mexico ("Western Bank") to sell its collateral to satisfy the indebtedness owed Western Bank in the amount of approximately $190,000.00. The Bankruptcy Judge has determined that the value of the collateral is less than the amount of the outstanding indebtedness owed to Western Bank. The Bank proposes to sell this collateral to American Building Supply, Inc. (the "Corporation"), the principals of which are the individuals who originally guaranteed the indebtedness owed Western Bank. Western Bank proposes to sell the collateral to the Corporation for the amount of the outstanding indebtedness. The sale to the Corporation will be consummated on May 29, 1991, unless a higher offer (Payable only in cash or certified funds), is received by Western Bank before 2:00 o'clock P.M. on May 29, 1991. All offers must be in writing and must be payable in cash or certified funds.

Offers and inquiries concerning this sale and to arrange for inspection of the collateral may be directed to Jason Shaller, Senior Vice President, Western Bank of Albuquerque, 505 Marquette, N.W., P.O. Box 26144, Albuquerque, New Mexico 87125-6144, (505) 888-9000.

DUBOIS, CAFFREY, COOKSEY & BISCHOFF, P.A.
BY: /s/ Gerald E. Bischoff
GERALD E. BISCHOFF
Attorneys for Western Bank
2040 Fourth Street, N.W.
Albuquerque, New Mexico 87102
Telephone: (505) 243-6721

HCS Legal No. 1379; Pub. May 24, 1991

EXHIBIT
4